STATE OF MICHIGAN

COURT OF APPEALS

Estate of RODNEY ROBINSON, Deceased, by TIA GROSS, Successor Personal Representative,

Plaintiff-Appellant,

v

DETROIT MEDICAL CENTER, DMC HEALTHCARE CENTER, INC., ELRINGTON MEDICAL CENTER, P.L.L.C., and ERROL G. ELRINGTON, M.D.,

Defendants-Appellees.

UNPUBLISHED
October 4, 2007

No. 266822
Wayne Circuit Court
LC No. 05-513618-NH

Estate of RODNEY ROBINSON, Deceased, by TIA GROSS, Successor Personal Representative,

Plaintiff-Appellee,

v

DETROIT MEDICAL CENTER, DMC HEALTH CENTERS, INC., ELRINGTON MEDICAL CENTER, P.L.L.C., a/k/a ERLINGTON MEDICAL CENTER, P.L.L.C., and ERROL G. ELINGTON, M.D., a/k/a ERROL G. ELRINGTON, a/k/a ERROL G. ERLINGTON, M.D.,

Defendants-Appellants.

No. 270561
Wayne Circuit Court
LC No. 06-600865-NH

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

These consolidated appeals involve wrongful death medical malpractice actions. In Docket No. 266822, plaintiff Tia Gross, the successor personal representative of the decedent's estate, appeals as of right from a circuit court order granting defendants summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations), and dismissing a complaint filed by the

estate's initial personal representative, Tuwana Gross-Robinson. In Docket No. 270561, defendants appeal by leave granted from a circuit court order denying their motion for summary disposition of a second complaint that plaintiff filed on behalf of the estate. We affirm in part, reverse in part, and remand.

This Court reviews de novo the circuit court's summary disposition rulings. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

> Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." [*Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004), quoting *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).]

"Whether a period of limitations applies to preclude a party's pursuit of an action constitutes a question of law that we [also] review de novo." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003). "Additionally, the application of a legal doctrine, such as res judicata, presents a question of law that we review de novo." *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

Regarding the complaint filed by Gross-Robinson, because the last instance of malpractice alleged in the complaint occurred on July 9, 2002, and the claim thus accrued on this date, MCL 600.5838a(1), the two-year medical malpractice period of limitation in MCL 600.5805(6) extended through July 9, 2004, at the latest. Gross-Robinson did not file within the two-year limitation period either the original complaint or the mandatory notice of her intent to sue defendants, MCL 600.2912b.

In wrongful death actions, the wrongful death saving provision, MCL 600.5852, generally affords a plaintiff personal representative two years after receiving letters of authority in which to pursue legal action on behalf of a decedent's estate. Because Gross-Robinson was appointed the estate's personal representative on December 16, 2002, the wrongful death saving period extended the time in which she could bring suit through December 16, 2004. Gross-Robinson filed the complaint on May 5, 2005, approximately five months after the saving period expired.

The estate maintains that at the time of Gross-Robinson's appointment, the giving of notice of intent to sue for malpractice, which she provided defendants on November 3, 2004, tolled the wrongful death saving period pursuant to MCL 600.5856(c). In *Waltz*, *supra* at 648-651, 655, the Michigan Supreme Court held that under the clear and unambiguous language of MCL 600.5856, a notice of intent to sue operates to toll the two-year malpractice period of limitation in MCL 600.5805(6), but does not toll the period in MCL 600.5852, which constitutes a wrongful death *saving period*, "an *exception* to the limitation period." (Emphasis in original). Controlling decisions of this Court have determined that (1) the Supreme Court's holding in *Waltz* "applies retroactively in all cases," *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006), lv gtd 477 Mich 1066 (2007), and (2) equitable or "judicial tolling should not operate to relieve wrongful death plaintiffs from complying with *Waltz*'s time

restraints," *Ward v Siano*, 272 Mich App 715, 720; 730 NW2d 1 (2006), lv in abeyance ___ Mich ___; 729 NW2d 213 (2007). Furthermore, as summarized in *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 576 n 27; 703 NW2d 115 (2005), both the Michigan Supreme Court and this Court have rejected the notion that a retroactive application of *Waltz*, in a manner that renders an estate's commencement of suit as untimely, qualifies as an unconstitutional abbreviation of the period for filing suit.

The estate contends that plaintiff's appointment as its successor personal representative afforded her a new wrongful death saving period in which to pursue legal action, which she timely did by filing the complaint in LC No. 06-600865-NH on January 9, 2006. The Michigan Supreme Court in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 33; 658 NW2d 139 (2003), determined that MCL 600.5852 "clearly allows an action to be brought within two years after letters of authority are issued to the personal representative." Because § 5852 "does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative," the Supreme Court held that the successor personal representative could timely file suit within two years after receiving his letters of authority, and "'within 3 years after the period of limitations ha(d) run.'" *Id*., quoting § 5852.

This Court has distinguished *Eggleston* and declined to apply it, however, in cases like this involving the original personal representative's untimely filing of a complaint. See *McLean v McElhaney*, 269 Mich App 196, 201-202; 711 NW2d 775 (2005), lv in abeyance ___ Mich ___; 728 NW2d 867 (2007) (finding the plaintiff copersonal representatives' medical malpractice complaint untimely, and rejecting their *Eggleston*-based assertion "that the trial court should have permitted a voluntary dismissal of [the] plaintiffs' claims without prejudice so that a new personal representative could have been appointed to file suit on behalf of [the] estate"); see also *McMiddleton v Bolling*, 267 Mich App 667, 671-674; 705 NW2d 720 (2005) (rejecting the contention that "the subsequent appointment of the successor personal representative revived the complaint that the original personal representative filed untimely, i.e., more than two years after the original personal representative was appointed").

In any event and notwithstanding *Eggleston*, our Supreme Court's recent decision in *Washington*, *supra* requires that we reject the circuit court's conclusion that res judicata does not apply because the dismissal of Gross-Robinson's complaint pursuant to subrule (C)(7) is not a decision on the merits. In *Washington*, the original personal representative filed an untimely complaint that the circuit court dismissed pursuant to MCR 2.116(C)(7), and the plaintiff, a later-appointed successor personal representative, also filed a complaint on the estate's behalf. *Id*. at 415. The Supreme Court held that res judicata barred the successor's action. *Id*. at 417-422.

Applying *Washington* to this case, we conclude that res judicata likewise bars plaintiff from pursuing a second wrongful death medical malpractice action on the estate's behalf. First, involuntary dismissal of the complaint filed by Gross-Robinson was warranted under MCR 2.116(C)(7) (statute of limitations), which ground embodies a dismissal on the merits under MCR 2.504(B)(3), and the court in no respect purported to "limit[] the scope of the merits decided." *Washington*, *supra* at 419. Additionally, plaintiff shares privity with Gross-Robinson because both represented the legal interest of the estate. *Id*. at 421-422. Regarding the third res judicata element, whether the matter raised in the second case was or could have been resolved in the first, a comparison of the complaint filed by Gross-Robinson and the nearly identical complaint filed by plaintiff reveals that apart from minor differences in the caption and two

paragraphs reflecting plaintiff's appointment as the successor personal representative, the allegations of negligence in the second complaint encompass the same defendants, the same time period, and the same maltreatment of the decedent as the allegations of malpractice comprising the original complaint. Plaintiff's complaint thus involves the same operative facts as the basis for relief asserted in the original complaint filed by Gross-Robinson. *Id*. at 420.[1]

In summary, in Docket No. 266822, we affirm the circuit court's order granting defendants summary disposition of the complaint untimely filed by Gross-Robinson. In Docket No. 270561, we reverse the circuit court's order denying defendants summary disposition of the complaint filed by plaintiff, and remand for entry of an order granting defendants summary disposition of plaintiff's complaint pursuant to MCR 2.116(C)(7).

We affirm in part, reverse in part, and remand. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood

[1] Because we conclude that the circuit court erred in rejecting res judicata as a basis for dismissing plaintiff's complaint, we need not address defendants' proposed alternative grounds for summary disposition involving MCR 2.116(C)(6) and their unpreserved contention that plaintiff failed to supply them with a notice of intent.